No. 80-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUDOUN TIMES-MIRROR, et al.,
Petitioners,

v.

ARCTIC COMPANY, LTD., t/a
IROQUOIS RESEARCH INSTITUTE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 24, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Where the Petitioners failed to challenge the opinion of the District Court in the court below, and acquiesced in the decision of the District Court which found that Respondent was not a "public figure," can the Petitioners, now for the first time, raise this as an issue to be considered by this Court?

2. Does an independent privately owned company not generally known in the community which is engaged in historical and archeological research, and which is employed by a Water Authority for a short period of time to perform a specific study but without any authority to participate in policy determinations, recommendations, and exercising no discretion, no judgment, or decision-making authority become a "public official" for libel litigation purposes?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Arctic Company, Ltd., T/A Iroquois Research Institute, Appellant

Loudoun Times-Mirror, Appellee

Kyle Parks, Appellee

R. E. McDaniel, Appellee

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ARCTIC COMPANY, LTD., t/a
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit by Senior Circuit Judge Russell and Circuit Judge Sprouse has been reported as *Arctic Co. Ltd.* v. *Loudoun Times-Mirror,* 624 F2d 518 (1980).

The opinion of the District Court has not been officially reported. The decision was unofficially reported as *Arctic Company, Ltd., t/a Iroquois Research Institute* v. *Loudoun Times-Mirror, et al,* and *Arctic Company, Ltd., t/a Iroquois Research Institute* v. *R. E. McDaniel* in *Media L. Rep.* 1947 (1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 3, 1980. The Petition for Writ of Certiorari was filed October 1, 1980. This Brief in Opposition to Petition for Certiorari is filed after one enlargement of time duly granted by the Court, within 60 days of that date and by November 24, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The facts pertinent to this Court's consideration are in Respondent's view, adequately set forth in the opinion below by Circuit Judge Sprouse for the Fourth Circuit Court of Appeals and will not be restated here. The opinion below has been reported as *Arctic Co. Ltd.* v. *Loudoun Times-Mirror,* 624 F.2d 518 (1980).[1]

REASONS FOR DENYING THE WRIT

The Court Below Correctly Found That Respondent Was Not A "Public Figure" Or A "Public Official" And That Respondent Was A Private Person For Libel Litigation.

In granting summary judgment for the Petitioners, Judge Bryan, Jr., the trial judge, found that Respondent was not a public figure (Pet. p. 13a). The court below agreed with the trial judge, and in so doing, it reinforced the District Court's finding by stating at p. 521:

> "We agree with the trial court that Iroquois is not a public figure in the libel context. It was not

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[1] Page Reference herein to the opinion of the court of appeals will be made to the opinion as reported in the F2d series.

> generally known in the community—in fact the defendant news reporter only became aware of its identity during the preparation of the news story —and did not "press itself" into the public controversy over the use of Lowes Island. It merely performed a narrowly-defined professional service in a highly technical field. This background and activity does not fit the definition of a public figure. See *Wolston* v. *Reader's Digest Association,* 443 U.S. 157, 99 S. Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson* v. *Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)."

In their response to the appeal below, Petitioners did not argue that the District Court had erred in failing to find that Respondent was a "public figure". Petitioners were content with the District Court's finding in this respect for they concentrated the entire thrust of their argument to the court below in support of the District Court's ultimate finding that Respondent was a "public official".

It comes as a surprise to Respondent that Petitioners, at this late date, should in effect abandon the District Court's finding, and ask this Court to consider this question without first notifying the court below of their views on the District Court's finding, that Respondent was not a "public figure". Petitioners apparently want it both ways. However, having previously accepted the District Court's decision without challenge, Petitioners should not now be permitted to challenge for the first time a decision in which they acquiesced. Petitioners cannot now argue a point which they failed to press below.

Significantly, the District Court found upon review of the evidence that "There is, in the Court's view, no evidence here that the plaintiff is a 'public figure' ". (Pet. p. 13a) The court below agreed with the trial court and went on to find that Iroquois "was not generally known in the community . . . and did not 'press itself' into the public controversy over the use of Lowes Island." (*Arctic supra* p. 521). The court below also found that Iroquois had "merely performed a narrowly-defined professional service in a highly technical field. This background and activity does not fit the definition of a public figure." (*Arctic supra* p. 521).

The mere fact that Iroquois received payment from public funds does not convert a private contractor into a "public official". Iroquois's report of its research could only be submitted to its contracting agency, the Fairfax County Water Authority, for its use and purpose. Such a report has no general circulation and cannot be equated with one who has "assumed a role of special prominence in the affairs of society," or one who "has thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 345 (1974). The general public's attention which was attracted to Lowes Island concerned its commercial development and not the water intake facility to be constructed by the Water Authority. Respondent, a private contractor, not concerned with the commercial development of the island, cannot be "automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston* v. *Reader's Digest Association,* 443 U.S. 157, 167 (1979). Until the publication by Petitioners of the newspaper accounts,

Respondent was not generally known in the community. Petitioners who have been charged with defamation cannot, by their own conduct create their own defense by making Respondent a public figure. *Hutchinson* v. *Proxmire,* 443 U.S. 111, 135 (1979).

To elevate Respondent, a private contractor, to the status of "public official," Petitioners disregard the limited purpose of Respondent's employment. Thus, the court below found that Respondent had been employed for only a short period of time, approximately six months, by the Fairfax County Water Authority. Respondent's role was "solely that of a scientific fact-finder, merely reporting to its principal, the Water Authority, the archeological facts as found. It had no control over the conduct of governmental affairs. It made no recommendations, participated in no policy determinations, and exercised no discretion. Its position was not of such apparent importance that the public has an independent interest in its qualifications beyond the general interests in the qualifications and performance of all governmental employees or consultants." (*Arctic supra* pp. 521-522). The court below correctly applied the criteria for determining whether a person is a "public official" for libel litigation as enunciated in *Rosenblatt* v. *Baer,* 383 U.S. 75, 85-86 (1966). Petitioners' discussion about the National Environmental Policy Act, 42 U.S.C. § 4321 does not detract in any way from Respondent's limited role in the matter, as found by the court below.

Petitioners argue that in light of the statutory scheme enacted by congress, the government must justify the environmental impact of its policy choices, and that scrutiny by the public at large is a part thereof, and further, that those who perform functions on be-

half of the government must expect scrutiny. (Pet. p. 17) However, performance of functions on behalf of the government does not equate to governmental functions, the performance of which by individuals raises those individuals to the level of "public official," as per *The New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) case.

Respondent performed a historical and archeological survey for the Fairfax County Water Authority. This does not constitute a governmental function which would elevate it to the status of "public official." *Rosenblatt* v. *Baer,* 383 U.S. 76, 86 (1966). The decision-making and judgment responsibilities were not delegated to Respondent but remained in the Water Authority, and this was so found by the court below.

The broad public participation and debate envisioned by Congress, and argued by Petitioners, as the basis for requiring free access by the press to these private contractors is fundamentally different from the full and vigorous consideration to be given to environmental values with regard to the decision-making process by a governmental agency. (Pet. p. 13) Congress did not intend debate upon how these values were assessed but only that they be fully assessed and that all factors be considered. (Pet. p. 12-13 n. 8).

If the Congressional intent was, in fact, as Petitioners would have this Court believe, it would have a far greater "chilling effect" on the implementation of the Congressional statutory scheme. Public scrutiny, as envisioned by Petitioners, would apparently give license to defame private contractors hired to perform the surveys as herein, and there is nothing advanced

by the Petitioners which discloses any such Congressional intent.

Although Petitioners argue that the effect of the opinion of the court below would be to insulate from the public and press scrutiny, an entire class of consultants (Pet. p. 10), this is contrary to the holding of the court below which was concerned with a very narrow set of facts pertaining to a single private contractor hired for a specific and limited project by a Water Authority. The opinion of the court below is limited to this situation and does not for one moment attempt to address itself to a "class" of contractors.

This Court Should Not Review The Case Because The Court Below Made A Nonfinal Judgment And Petitioners Have Not Shown The Existence Of Exceptional Reasons To Warrant Review Of The Case At This Stage Of The Proceedings.

The court below reversed the summary judgment of the district court and remanded the case for further proceedings. Thus, the status of the decision below is in the nature of a nonfinal judgment. This Court will not usually review a nonfinal judgment such as that herein, except for exceptional reasons. *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1892); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) Stern & Gressman, *Supreme Court Practice*, § 4.19 (5th ed. 1978). Petitioners have not set forth any exceptional reasons warranting review at this time.

It is submitted that the court below properly considered the matter and resolved it in accordance with established precedent of this Court.

CONCLUSION

For the foregoing reasons Respondent, Arctic Company, Ltd., t/a Iroquois Research Institute, respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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